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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Deployment of Wireline Services	)	CC Docket No. 98-147
Offering Advanced Telecommunications	)	
Capacity	)	

COMMENTS OF RCN TELECOM SERVICES, INC. ON NOTICE OF PROPOSED RULEMAKING

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SUMMARY

As the Commission recognized in its NPRM, the telecommunications environment is currently experiencing a transition to digital technology. Advanced services using such digitization offer the promise of increased products that could provide Americans with access to more readily available information than ever before. RCN commends the Commission for its determination to ensure that all Americans have access to these advanced telecommunications products. As a service provider to the residential market, RCN believes that the best way to promote competition for advanced services is to ensure lively and active competition in the market.

It is for this reason that RCN urges the Commission to be cautious in permitting ILECs to set up separate subsidiaries that could be excused from the requirements of Sections 251 and 271 of the Telecommunications Act of 1996. As the proposal is currently written, there are substantial loopholes that could permit an ILEC to favor its affiliate at the expense of CLECs. Therefore, the Commission should adopt safeguards in addition to the ones currently proposed. For example, the Commission should prohibit any marketing and/or advertising with the ILEC and should prohibit the affiliate from using the ILECs' brand name. In short, the Commission must adopt appropriate regulations to ensure that the affiliate does not: (1) have control over assets used to provide monopoly telecommunications services; and (2) will not be afforded favorable treatment in order to gain access to monopoly controlled facilities and equipment. These provisions should not sunset until after the ILEC is declared non-dominant. Similarly, the Commission should refrain from adopting any *de minimis* exception for transfers of network equipment between the ILEC and affiliate. Such an exception could potentially permit the ILEC to evade the Commission's prohibition against the transfer of network equipment.

If the Commission does adopt a separate affiliate exception, it must supervise the arrangement. Accordingly, the Commission should establish a detailed preapproval process for the affiliate and should monitor the continued compliance with the requirements under the affiliate plan. The Commission should also preempt any state regulation that would permit significant transfers to any affiliate.

To further promote competition in the provision of advanced telecommunications services, the Commission should adopt national collocation standards that would ensure access to collocation at reasonable rates. First, the ILECs should not be permitted to impose unnecessary restrictions on the type of equipment that competing carriers may collocate. CLECs should be permitted to collocate virtually any type of telecommunications equipment used for voice and data communications, including equipment that contains switching functionality. Second, the Commission must ensure that ILECs make collocation space available for CLECs. CLECs seeking collocation space should be permitted to tour the ILEC premises when collocation is denied or inappropriate space is offered. Moreover, the Commission must adopt procedures to ensure that the first collocator is not burdened with the entire cost of building out appropriate collocation space.

RCN agrees with the Commission's concern that existing loop unbundling rules do not fully ensure that CLECs have adequate access to the "last mile" of the local loop. Accordingly, the Commission should ensure that the "last mile" is available to all carriers on a nondiscriminatory basis and that loops are priced at reasonable rates. To further this goal, ILECs must be required to provide conditioned loops, free from bridge taps, load coils and midspan repeaters, on request, and must provide sufficient information for the CLEC to determine whether the loop is conditioned. The Commission should also extend loop unbundling requirement to sub-loop elements.

To further promote competition in the telecommunications market, it is essential that CLECs have access to dark fiber. Accordingly, the Commission should determine in this proceeding that dark fiber is a unbundled network element. The current unsettled regulatory status of dark fiber represents a substantial barrier to CLECs in negotiating for and obtaining dark fiber from incumbent providers.

RCN does not support the Commission's suggestion that it should grant Section 251(c) relief to ILECs that offer advanced services on an integrated basis. Any such grant of relief would inhibit competition.

RCN agrees with the Commission's tentative conclusion that advanced services must be offered for resale at a wholesale rate discount. Advanced telecommunications services fall within the core category of retail services that both Congress and the Commission anticipated would be available for resale with such discounts.

Finally, RCN strongly objects to any modification of LATA boundaries that would permit BOCs interLATA entry prior to compliance with § 271 of the 1996 Act. The Commission must not reward the BOCs' anticompetitive behavior by permitting an early entry to the interLATA markets.

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RCN Telecom Services, Inc. ("RCN"), through undersigned counsel, hereby respectfully submits its Comments on the Notice of Proposed Rulemaking issued by the Commission in the above-captioned proceeding.[1]

I. INTRODUCTION

RCN, by itself and through various affiliations, is a facilities-based competitive provider of local exchange and long distance telephone services, high-speed Internet access, and traditional franchised cable and/or OVS services, primarily to residential subscribers. RCN employs a variety of technologies to offer these services in direct competition with many of the nation's largest, most well-established telephone and cable incumbents. RCN's business plan emphasizes the residential market and is structured to offer consumers a combination of local exchange and long distance telephone service, high-speed Internet access, and traditional cable or OVS services in one bundled

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[1] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 98-188, released August 7, 1998 ("*Section 706 NPRM*").

offering. Generally, RCN offers these services, both in a package or individually, at competitive rates.

In order to compete effectively with the incumbent local exchange carriers ("ILECs" or "incumbents") and continue to offer reasonable rates for its packaged services, it is essential for RCN to gain nondiscriminatory access to the incumbents' local networks. Although RCN agrees with and applauds the Commission's efforts to ensure widespread availability of advanced telecommunications services, RCN is concerned that permitting incumbents to provide services through "separate" subsidiaries could undermine competition if the provision is not carefully crafted. Permitting the incumbent to transfer any significant assets to the affiliate or to jointly market with the affiliate could provide the opportunity for anticompetitive behavior. Thus, if the Commission allows the incumbents to provide advanced telecommunications services through an "affiliate," it must be careful to provide stringent standards to prevent unlawful discriminatory behavior against competitive local exchange carriers ("CLECs").

Moreover, if the Commission genuinely wishes to further competition and the widespread deployment of advanced telecommunications services, it should adopt national standards for collocation and loop unbundling. As the Commission aptly noted in its NPRM, collocation throughout the country has been inconsistent, difficult to obtain and prohibitively expensive. Without the ability to collocate its equipment, CLECs will have little success in breaking through the incumbents' monopoly control. Similarly, the current loop unbundling requirements have been unable to provide CLECs with adequate access to the "last mile" that is essential to provide services in the residential market, which RCN is targeting. Accordingly, the Commission should adopt national standards to ensure that incumbents provide CLECs with appropriate collocation and access to local loops.

II. If the Commission Permits ILECs to Establish Separate Subsidiaries to Provide Advanced Telecommunications Services, the Commission Should Ensure that There Will be No Incentive for the ILEC to Discriminate

While RCN applauds the Commission's desire to promote the widespread availability of advanced telecommunications services, RCN is concerned that the separate affiliate proposal could grant the ILECs a vehicle for discriminating against CLECs trying to break into the advanced telecommunications market. The proposal contains huge loopholes that could allow an ILEC to favor its affiliate at the expense of CLECs. For instance, the Commission proposes allowing some joint operation and ownership of transmission facilities and does not prohibit joint marketing and use of brand names. The ability to share in these important assets would not render the subsidiary "separate" in a manner that would promote competition.

A. The Separate Subsidiary Must Not Be A Successor or Assign of the ILEC

The Commission reasons that if an affiliated subsidiary is truly separate from the incumbent, that affiliate would not be deemed an ILEC and would therefore be relieved of Section 251(c) obligations. According to Section 251(h) of the Telecommunications Act, an affiliate would be considered an ILEC if it is deemed "a successor or assign" of that ILEC.[2] Prohibiting the separate subsidiary from being a "successor or assign" of the ILEC illustrates that Congress intended a completely divested subsidiary. In particular, the word "assign" describes a party who has received

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[2] 47 U.S.C. § 251(h)(1).

an assignment of property or contract rights.[3] RCN believes that a strict interpretation of this definition is most consistent with the purposes of Section 251, which was enacted to require incumbents to grant CLECs access to its facilities, unbundled elements and wholesale rates, not to establish mechanisms to escape opening its markets. Accordingly, since Section 251(h) would prohibit the affiliated subsidiary from being a successor or assign, it is plain that there should be little if any transfer of any type of property or rights between the incumbent and its affiliate.

Moreover, it is questionable that the separate subsidiary as proposed by the Commission would even be lawful under Section 251(h). The Commission proposes that an advanced services affiliate of an incumbent LEC would be excused from Section 251(c) obligations if it: (1) satisfies adequate structural separation requirements; and (2) acquires, on its own, facilities used to provide advanced services.[4] However, it is likely that the transfer to an owned and controlled affiliate of the ILEC of assets that would realistically be necessary to form a separate subsidiary, would be substantial enough that the affiliate would be an assign under Section 251(h). The inherent danger in this scenario is the possibility of excusing a company using monopoly equipment and resources from the essential requirements of Section 251(c).

Nevertheless, if the Commission decides to move forward with its proposal to permit ILECs to establish affiliates that would be excused from the requirements of Section 251(c), it must be careful to ensure that the affiliate does not: (1) have control over assets used to provide monopoly

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3 *Restatement of Contracts Second*, § 323, Comment b.

4 *Section 706 NPRM*, ¶ 92.

telecommunications services; and (2) will not be afforded favorable treatment in order to gain access to monopoly controlled facilities and equipment. The Commission has proposed seven structural separation and nondiscrimination requirements with which the affiliate would need to comply in order to be excused from Section 251(c) obligations.[5] While RCN agrees that these seven requirements are a good start in ensuring adequate separation, the list does not go far enough. For example, the Commission's first requirement is that the incumbent must "operate independently" from its affiliate.[6] In particular, the incumbent and affiliate may not jointly own switching facilities or the land and buildings on which such facilities are located. RCN believes that requirement should be expanded to prohibit the joint ownership of *any* facilities. As the proposal is currently written, affiliates might be permitted to share transmission facilities with the ILEC, which would be a significant advantage especially if the sharing arrangement provides that sharing is based on a valuation of the property at depreciated book value, thus passing on substantial cost savings to the affiliate.

Moreover, additional safeguards are necessary to help ensure that the affiliate does not receive favorable treatment from the ILEC. Specifically, the Commission should prohibit any joint marketing and/or advertising with the ILEC of local exchange or exchange access services and the affiliate should be required to choose a name that is unambiguously distinct from that of the ILEC and its corporate parent. These two requirements are essential to ensuring increased competition in

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[5] *Section 706 NPRM*, ¶ 96.

[6] *Id.*

advanced telecommunications. In the current environment, incumbent LECs still control the local network and dominate the local exchange market. Permitting an affiliate to use the ILEC's brand name and/or jointly market services with the ILEC would allow the affiliate to utilize the incumbent's continuing bottleneck control over the local network, which would plainly violate the policy of Section 251(c). For instance, an advanced services affiliate using the ILEC's brand name and jointly billing for voice traffic and advanced services would appeal to consumers who are already required to use the ILEC for their local service and would prefer advanced services and local services bundled as part of a single package. Similarly, any joint marketing among the ILEC and the affiliate would give customers the impression that the ILEC would be providing the advanced telecommunications services.

In addition to a prohibition of joint marketing and name sharing, the affiliate should not be permitted to share any personnel, Customer Proprietary Network Information ("CPNI") and administrative functions. As the Commission stated, the incumbent and the affiliate should maintain separate employees, officers and directors. [7] However, the incumbent and affiliate should also not be permitted to share administrative functions. For example, human resources and office administration should not be shared between the two companies. More importantly, the incumbent should be prohibited from sharing CPNI information with the affiliate. Permitting any sharing of CPNI would give the affiliate an undue advantage based on its relationship with the incumbent.

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[7] *Id.*

From a facilities perspective, in addition to the requirements already proposed, the Commission should require that all facilities the affiliate purchases from the ILEC must be at cost-based rates, which are available to any other CLEC. However, the advanced services affiliate should be prohibited from offering resold local exchange services purchased from the ILEC. Allowing the affiliate to resell the monopoly ILEC local exchange services would result in joint enterprising and combinations that would thwart CLEC entry. For example, the advanced services affiliate could potentially have the advantage of joint marketing of its advanced service with the ILEC's local service potentially under the ILEC trade name. In addition, to ensure that the affiliate is acting and is treated like other CLECs, the Commission should require the affiliate to use the same operations support systems (OSS) for ordering, provisioning, billing, maintenance and repair as every other CLEC.

From a financial perspective, RCN agrees with the Commission, that the affiliate must maintain separate books, records, and accounts and that the affiliate must not obtain credit under any arrangement that would permit a creditor to have recourse to the assets of the incumbent. Furthermore, RCN urges the Commission to require that there be sufficient independent ownership of the affiliate to trigger SEC reporting requirements and to ensure that the affiliate has the fiduciary obligation to make a profit.

To ensure that ILECs are not discriminating in favor of their affiliate, the Commission should also place further restrictions on how the ILEC must deal with the affiliate as a CLEC. As the Commission has noted, CLECs have had substantial problems collocating with the ILECs.

Accordingly, the Commission should ensure that the affiliate must never obtain more than 33% of the collocation space or other network capacity in a central office.

RCN urges the Commission to refrain from adopting a sunset provisions after which these safeguards would not be required.[8] Such a sunset provision could seriously undermine competition in advanced services. As long as the incumbent has market power, it will have the incentive and ability to thwart competition by favoring its affiliate and discriminating against competitors. Accordingly, these safeguards should continue in effect until such time as the incumbent is declared non-dominant. An earlier abandonment of safeguards would permit incumbents to inhibit competition in the provision of advanced services.

B. The Commission Should Permit No Transfers of Network Equipment Between the Incumbent and Affiliate

RCN agrees with the Commission's conclusion that if an ILEC transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis or any local loops, the affiliate would be an assign of the ILEC and therefore would be required to comply with Section 251(c).[9] However, RCN urges the Commission to refrain from adopting any "*de minimis*" exception, which could potentially permit the ILECs to evade the Commission's prohibition. The Commission has proposed allowing a *de minimis* exception for transfers of network equipment, possibly limited to equipment already owned or ordered by the incumbent. The Commission should decide against such an exception.

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8 *See Section 706 NPRM*, ¶ 99.

9 *Section 706 NPRM*, ¶¶ 106-07.

First, a *de minimis* exception would serve no legitimate purpose. If the Commission has already determined that it would be harmful to permit the ILEC to transfer equipment to its affiliate in the future, there is no reason to make an exception for equipment already purchased. If the incumbent determines that it will provide advanced services through a separate affiliate and that affiliate is to be treated as a CLEC for regulatory purposes, it should not have the advantage of receiving facilities from the incumbent, even of a *de minimis* nature. Moreover, permitting the transfer of already owned equipment to affiliates would not promote the availability of advanced telecommunications services. The purpose of allowing the ILEC to set up a separate affiliate is to encourage investment on the part of the ILEC. As to network facilities already purchased or under order, the ILECs have already made their investment decisions, knowing that the open access obligation under § 251(c) applies. Accordingly, there is no reason for the Commission to deviate from its prior ruling that transfers of any network facilities render that affiliate an incumbent under Section 251(h).

C. <u>The Commission Should Require Prior Approval of Separate Affiliates</u>

RCN is concerned with the Commission's suggestion that the network disclosure rules might constitute sufficient notification to the industry of transfers to the affiliate.[10] To the contrary, those rules would not provide for appropriate notice because those rules require notification of network functionality changes affecting services or interconnection parameters, and most asset transfers

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[10] *Section 706 NPRM*, ¶ 115.

contemplated by the Commission would not inherently involve these network impacts, or could be accomplished without them.

Indeed, if the Commission adopts a separate affiliate plan as suggested in its rulemaking, the Commission should establish a detailed preapproval process for the affiliate.[11] The Commission should require the ILEC to submit a complete plan for establishing the affiliate including proposed asset transfers, marketing plans, and a capitalization plan, with an opportunity for public comment. This approach is necessary to ensure that the ILEC's separate affiliate will not undermine the pro-competitive goals of the Telecommunications Act of 1996.

Moreover, to ensure continued compliance and nondiscriminatory behavior, the Commission's involvement should not end with the formation of the separate subsidiary. If the Commission adopts a separate affiliate proposal, the Commission must not only have a pre-approval process but should monitor the affiliate for continued compliance with the requirements under the affiliate plan and should permit public comment on certain aspects of the ILEC-affiliate relationship. Specifically, the Commission should require prior approval and allow public comment on any tariff or interconnection agreement between the ILEC and its affiliate. The Commission should also

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[11] In its *Computer II* regulatory regime the Commission established prior approval procedures for provision of enhanced services by separate affiliates of AT&T and GTE. *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II),* 77 FCC 2d 384, ¶ 260 (1980) (*Computer II Final Decision*), *recon.*, 84 FCC 2d 50 (1980) *(Reconsideration Order), further recon.*, 88 FCC 2d 512 (1981) *(Further Reconsideration Order), affirmed sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). *See also In the Matter of American Information Technologies Corp., BellSouth, NYNEX; Interim Capitalization Plans for the Furnishing of Customer Premises Equipment and Enhanced Services (Centrex Sales Agent Order*), 98 F.C.C.2d 943 (1984).

establish enforcement procedures for CLECs to bring complaints against ILECs and affiliates that are violating the rules and must provide for sufficient penalties.

D. The Commission Should Preempt State Regulation

The Commission should preempt any state regulation that would permit significant transfers to any affiliate, or adopt different safeguards, in connection with the affiliate's provision of intrastate services that could potentially undermine the Commission's determinations. Because it will not be possible, as a practical matter, for an affiliate to receive a transfer of facilities for intrastate communications without also authorizing a transfer for interstate communications, the state and federal jurisdiction as to this issue is not severable. Given this inseverability, it is clear that the Commission has the authority to preempt state regulation that would be incompatible with its separate affiliate scheme, and indeed has established similar preemptions previously.[12] Absent such preemption, states could authorize transfers that could undermine the Commission mandated limitations.

III. The Commission Should Enforce National Collocation Standards

RCN supports the Commission's proposal to adopt national collocation standards pursuant to Sections 201 and 251 of the Act. Like many other CLECs, RCN has found the collocation process

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[12] *See* Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, n. 4 (1986). *See also* Maryland Public Service Comm'n v. FCC, 909 F.2d 1510 (D.C. Cir. 1990); California v. FCC, 905 F.2d 1217 (9th cir. 1217); Texas Public Utility Comm'n v. FCC, 886 F.2d 1325, 1331 (D.C. Cir. 1989); National Association of Regulatory Commissioners v. FCC, 880 F.2d 422, 429 (D.C. Cir. 1989); North Carolina Utilities Comm'n v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

unduly frustrating and expensive. The ILECs differ in their standards for collocation and most CLECs have been hindered at every turn in their attempts to collocate. Adopting national standards would encourage the deployment of advanced services by increasing predictability and certainty, and would facilitate entry by competitors operating in several states. Although states could supplement the nationwide standard, the Commission should adopt minimum thresholds for collocation and should not permit states to adopt rules that would undermine the federal standards.

A. The Commission Should Require ILECs to Permit Collocation of All Types of Equipment

RCN agrees with the Commission's conclusion that ILECs should not be permitted to impede competing carriers from offering advanced services by imposing unnecessary restrictions on the type of equipment that competing carriers may collocate.[13] Accordingly, CLECs should be permitted to collocate virtually any type of telecommunications equipment used for voice and data communications, including equipment that contains switching functionality. For example, CLECs should be permitted to collocate Digital Subscriber Line Mutiplexers (DSLAMs) and remote switching modules. RCN believes that allowing collocation of equipment that performs both switching and other functions would encourage CLECs to use integrated equipment as a means to collocate equipment that otherwise would not be allowed in central offices. It is for this reason that the Commission should not distinguish between circuit or packet switching equipment for purposes of collocation. Any restrictions of collocation of switches would impose artificial constraints on design and manufacture of equipment that would result in inefficiencies and increased costs.

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[13] *Section 706 NPRM*, ¶ 129.

RCN also agrees with the Commission's conclusion that if an ILEC chooses to establish an advanced services affiliate, the incumbent must allow CLECs to collocate equipment to the same extent as the incumbent allows its advanced services affiliate to collocate equipment.[14] This would be required for the ILEC to meet its existing obligation to provide collocation on nondiscriminatory terms and conditions.

B. The Commission Should Set Additional Requirements to Ensure that ILECs Make Collocation Space Available to CLECs

Like many CLECs, RCN has found collocating with ILEC to be frustrating, unduly burdensome and very expensive. Accordingly, the Commission should take serious measures to ensure that ILECs offer increased collocation options and make space in their offices available for CLEC equipment. First, RCN agrees with the Commission's conclusions that additional types of collocation, including cageless collocation should be made available for CLECs.[15] The more options available, the more competitors will be able to penetrate the local and advanced telecommunications markets.

However, more importantly, the Commission must enact strict procedures to ensure that ILECs actually provide available space for CLEC collocation. It has been RCN's experience that ILECs will evade CLEC requests for collocation space, only providing undesirable space for CLECs while reserving perfectly good collocation space for unknown reasons. For example, RCN experienced substantial difficulties attempting to collocate in a couple of Bell Atlantic ("BA")

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14 *Section 706 NPRM*, ¶ 129.

15 *Section 706 NPRM*, ¶ 137.

offices in Manhattan. Although Bell Atlantic indicated that space was available, the space offered was raw space, without finished floors, walls or ceilings, HVAC or electric power. BA attempted to require RCN to build out the entire floor to use the space for collocation, which would cost approximately between $700,000 and $800,000. RCN believes that other ILECs have been similarly evasive in permitting CLECs the collocation space necessary to install the necessary equipment to provide competitive telecommunications services.

Accordingly, RCN urges the Commission to require ILECs to permit CLECs seeking physical collocation at LEC premises to tour the premises.[16] This should be provided in addition to the detailed floor plans and not only when an ILEC denies a request for physical collocation. As RCN has experienced, sometimes an ILEC will not deny a request for collocation but will offer unsuitable space. In these instances a CLEC should be permitted a tour of the premises as well. Although the ILEC is required to provide detailed floor plans, only a tour of the ILEC premises will actually provide the CLEC the information necessary to challenge the ILEC's denial of space or offer of unsuitable space. RCN agrees with the Commission that state commissions will be better able to evaluate whether a refusal to allow physical collocation or the offer of unsuitable space is justified if CLECs can view the LEC premises and present their arguments to the state commission.[17] As the Commission has indicated, floor plans by themselves are insufficient for that purposes

[16] *Section 706 NPRM*, ¶ 146.

[17] *Id.*

because there is no ability for the CLEC to challenge the information included on the floor plan. Only a tour of the premise would provide CLECs with that essential tool.

The Commission should also adopt procedures to allocate up-front space preparation charges. As RCN discovered in New York, the ILEC is likely to offer CLECs raw space that must be finished at the expense of the CLECs. It would be patently unfair and anticompetitive to penalize the initial collocator with the significant expense of conditioning the space for collocation. Accordingly, the Commission should establish procedures that would apportion the expenses to ensure that the initial collocator is not burdened with all of the expenses.

IV. The Commission Should Require ILECs to Provide Increased Access to Local Loops

RCN agrees with the Commission's concern that the existing rules with regard to the unbundling of loops do not fully ensure that CLECs have adequate access to the "last mile," which is critical to ensure that CLECs are able to fully compete in the advanced services market.[18] It is for that reason that the Commission must establish additional national rules for local loops pursuant to Sections 201 and 251 of the Telecommunications Act in order to remove barriers to entry and permit additional CLECs to provide advanced services. The Commission must ensure that the "last mile" is available to all carriers on a nondiscriminatory basis and that loops are priced at a reasonable rate. Because the last mile of the local loop is essential to the provision of services to the residential markets RCN is targeting, any decrease in costs would promote competition to this market.

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[18] *Section 706 NPRM*, ¶ 151.

Accordingly, the ILECs should be prohibited from raising loop costs by imposing additional fees on CLECs to which the ILECs are not subject.

A. The Commission Should Require ILECs to Provide Conditioned Loops and Information Sufficient to Determine Whether Loops are Conditioned

Essential to the ability of CLECs to provide advanced services is the requirement that ILEC's must provide "conditioned" loops that are able to be used to provide xDSL services. Obviously, if the ILEC is able to avoid providing access to such loops, they will have little competition in the provision of xDSL services. Thus, ILECs should be required to provide loops that are free of bridge taps, load coils, and midspan repeaters, on request.

Similarly, RCN agrees with the Commission's tentative conclusion that, as part of the rules governing Operational Support Systems ("OSS"), ILECs should be required to provide CLECs on request with sufficient information about the loop to enable them to determine whether the loop is capable of supporting xDSL.[19] However, while this information would enable CLECs to determine the extent to which loops are suitable for use with any equipment or services that the CLEC may be planning to use or provide, this information should not be able to be used as a substitute for the provision of conditioned loops. RCN urges the Commission to reject any ILEC claims that they lack sufficiently detailed or ready information concerning their loops.

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19 *Section 706 NPRM*, ¶ 157.

B. The Commission Should Require Sub-Loop Unbundling

RCN urges the Commission to adopt its proposal to extend loop unbundling requirements to sub-loop elements.[20] The Commission should require ILECs to provide access to feeder cable, portions of loops and remote terminals. In many situations, for example, if the loop is provisioned by means of a digital loop carrier system or where there is insufficient collocation space, sub-loop unbundling may be the only feasible way for a CLEC to access the loop in order to provide advanced services. Contrary to ILEC claims, sub-loop unbundling is technically feasible. The Commission should not permit ILECs to raise technical issues as a barrier to providing sub-loop unbundling. Moreover, in the event that existing pedestals or remote terminals do not have sufficient space to accommodate all requests for unbundled access, the Commission should require ILECs to construct, or allow the CLEC to construct, an adjacent remote terminal. Providing for sub-loop unbundling would further the competitive goals of the 1996 Act.

V. Dark Fiber Should Be an Unbundled Network Element

In the *Section 706 NPRM*, the Commission sought comment on the specific unbundling obligations it should impose on network elements used by incumbent LECs in the provision of advanced services.[21] RCN urges the Commission in this proceeding to take steps to promote the availability of dark fiber by resolving the uncertainty concerning the regulatory status of dark fiber and by determining the dark fiber is a UNE. Fiber cable has become the premier communications

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[20] *Section 706 NPRM*, ¶ 173.

[21] *Section 706 NPRM* at para. 180.

transmission facility combining low cost, efficiency, and huge capacity. Its broader availability from incumbent LECs to competing local service providers would substantially promote competition in provision of advanced services.

Whether incumbent LECs are obligated to provide dark fiber, and if so, on what terms and conditions, has been clouded by the uncertain regulatory status of dark fiber. In 1988, in connection with an investigation of individual case basis (ICB) pricing policies of LECs, the Commission determined that dark fiber ICB offerings of LECs were common carrier offerings subject to the Commission's jurisdiction.[22] Subsequently, the Commission denied LECs' request pursuant to Section 214(d) of the Act to discontinue their dark fiber offerings.[23] The Commission found that dark fiber is subject to Title II regulation because it is "wire communications" offered on a common carrier basis and that LECs had not shown that withdrawal of the offering would not adversely affect the public interest.[24] Later, the Commission permitted LECs to cease new offerings of dark fiber, but required continuation of existing offerings. The United States Court of Appeals for the District of Columbia Circuit then remanded these decisions to the Commission finding that the Commission had not adequately justified its reasoning in finding that dark fiber was a common carrier offering.[25] In addition, in 1990 EDS Corporation filed a petition for declaratory ruling asking the Commission

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[22] *Local Exchange Carriers' Individual Case Basis DS3 Offerings* (*ICB Reconsideration*), CC Docket No. 88-136, FCC 90-270, 5 FCC Rcd 4842 (1990).

[23] 47 U.S.C. Sec 214(d).

[24] *Southwestern Bell Telephone Company*, File No. W-P-C-6670, 8 FCC Rcd 2589 (1993).

[25] *Southwestern Bell Telephone Company v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994).

to determine that LECs have an obligation to furnish dark fiber on a common carrier basis.[26] The dark fiber issues on remand and the EDS petition remain pending before the Commission after four and eight years, respectively.

The issue of whether dark fiber should be an unbundled network element is also currently before the Commission. Section 3(29) of the Act defines a network element as "... a facility or equipment used in the provision of a telecommunications service ..." [27] It is evident that dark fiber meets this definition because dark fiber is a facility used to provide telecommunications service. The *Local Competition Order* expressly declined to reach the issue of whether dark fiber should be considered an unbundled network element.[28] However, this issue has been raised in pending petitions for reconsideration filed by interexchange carriers who argue that dark fiber should be considered an unbundled network element.[29]

The unsettled regulatory status of dark fiber represents a substantial barrier to competitive service providers in negotiating for and obtaining dark fiber from incumbent providers. The

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[26] *Local Exchange Carriers' Individual Case Basis DS3 Offerings, Request for Declaratory Ruling*, CC Docket No. 88-136, filed October 3, 1990.

[27] 47 U.S.C. Sec. 153(29).

[28] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No.96-98, First Report and Order, 11 FCC Rcd 15499, 15722 (1996) (*Local Competition Order*), *vacated in part, aff'd in part*, Iowa Utils. Bd. V. FCC, 120 F.3d 753 (8th Cir. 1997), *cert. granted on other grounds sub nom.* AT&T Corp. v. Iowa Utils. Bd., 118 S.Ct. 879 (1998).

[29] *See* Petition of AT&T Corp. for Reconsideration and/or Clarification, CC Docket No. 96-98, filed September 30, 1998; Petition for Reconsideration of MCI Telecommunications Corporation, CC Docket No. 96-98, September 30, 1998.